Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3512

Appeal MA16-378

Municipality of Meaford

October 31, 2017

Summary: A former employee submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Municipality of Meaford for any and all electronic or paper records which may refer to himself directly or indirectly. The municipality issued an interim fee decision in the amount of $169,502.00. The appellant takes the position that the municipality is not entitled to charge a fee for search time as he is only seeking access to his own personal information. In the alternative, the appellant submits that the municipality's fees are exaggerated. The appellant appealed the municipality's decision to this office and the adjudicator finds that most of the records requested by the appellant do not appear to constitute his personal information as defined in section 2(1) and the municipality is entitled to charge a fee. However, the adjudicator finds that, but for the portion of the request which seeks access to email records, the request is too broad to require a response from the municipality. The municipality's fee estimate of $400 to search its record holdings for email records is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) "definition of personal information", section 45(1) and *Regulation 823,* section 6.3.

Orders and Investigation Reports Considered: Order MO-2940.

OVERVIEW:

[1] The appellant submitted a request to the Municipality of Meaford (the municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for the following:

> … I am requesting copies (digital) of any and all materials, correspondence, emails, minutes of meetings council and staff that directly or indirectly reference myself collected or generated by staff or members of council and outside agencies or persons between the years of 2007 and March 31, 2016.
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> There will be virtually no research time since the municipality has a computerized records management bylaw/system whereby these types of records have specific file designations in accordance with the Ontario Municipal Records Management System (TOMRMS) for instant retrieval. All materials requested were to be filed in accordance with the TOMRMS system and the bylaws and the Municipal Act.
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> I am also requesting copies of the resumes that are on file at the municipal offices of;
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> 1. The Chief Administrative Officer
> 2. The Clerk
> 3. The Deputy Clerk
> 4. The Treasurer
> 5. The Deputy Treasurer
> 6. The Planner

[2] The municipality issued an interim fee decision estimating that the total fee would be $169,502.00 and that access to some of the records would be denied in full or in part under exemptions under the *Act*, such as the solicitor-client privilege exemption under section 12.

[3] The appellant appealed the municipality's decision to this office and a mediator explored settlement with the parties. During mediation, the appellant advised that he no longer sought access to the copies of resumes referenced in his request. However, the appellant continued to question the reasonableness of the municipality's fee. The appellant also confirmed that he was not interested in submitting a fee waiver request. As the municipality did not reduce its fee, the appeal was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry the parties filed representations and reply representations with this office.

[5] In this order, I find that most of the records requested by the appellant do not appear to constitute his personal information as defined in section 2(1) and that the municipality is entitled to charge a search fee. However, I find that but for the portion

of the request which seeks access to email records, the request is too broad to require a response from the municipality. Finally, I uphold the municipality's estimate fee of $400 to search its record holdings for email records.

PRELIMINARY ISSUES:

[6] The appellant claims that the municipality's $169,502.00 fee is unreasonable on the basis that it includes search time for records containing his personal information. The fee provisions under the *Act* provide that an institution cannot charge a fee for manually searching or preparing records containing the requester's personal information. Accordingly, before I review the municipality's $169,502.00 fee I must first determine if the records contain the appellant's personal information.

[7] Another issue that must be decided before I review the reasonableness of the municipality's fee is whether the request is too broad.

Does the request seek access to records containing the appellant's personal information?

[8] The request seeks access to records which "directly or indirectly reference" the appellant. The appellant submits that any record which responds to his request would contain his personal information.

[9] The municipality takes the position that the "majority" of records which would respond to the request "are associated with the requester in a professional capacity". The municipality also states:

> It will not be possible to identify which records may contain personal information until the [appellant] is able to narrow the scope of the request to make it sufficiently specific to reasonably be able to retrieve the documents that are being requested.

[10] The parties appear to agree that the appellant was an employee or consultant from 2005 and 2007, that he held a very senior position with the municipality during that time, and that he initiated court proceedings against the municipality in 2009. The action filed by the appellant sought damages for matters relating to his engagement with the municipality which was subsequently settled out of court. Very little information was provided to me about the cause of action but based on the information provided to me, it does not appear that the appellant sued the municipality for wrongful dismissal.

[11] Section 2(2.1) states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[1]

[13] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[2]

[14] Based on the submissions of the parties, I am satisfied that most of the records which would respond to the request would appear to relate to the appellant in his professional capacity. The request seeks records for an approximate 10-year period. During the years identified, the appellant worked for the municipality for several months and subsequently left. Within a couple of years of leaving the municipality, the appellant initiated a court action which was subsequently settled in 2014. Accordingly, it would appear that the appellant seeks access to records created several months before he left the municipality and several years after his employment-related claim was settled. There is no evidence before me suggesting that the municipality accused the appellant of any wrong-doing which would in my opinion bring the records within the realm of personal information. Any records containing information which would reveal something about a personal nature of the appellant, such as that his conduct was called into question or was the subject of an investigation would relate to the appellant in a personal nature. Such records would qualify as the appellant's personal information and the municipality cannot charge a fee to search or prepare these types of records for disclosure to the appellant.

[15] I further find that, the fact that the municipality was required to respond to the appellant's court action does not automatically bring records relating to the appellant within the realm of personal information. This office has held that records relating to the performance of one's job duties does not constitute their personal information.[3] In making my decision, I also took into consideration the breadth of the appellant's responsibilities at the municipality and am satisfied that his professional contributions and work would create a legacy that would be referenced in documents for some time after his departure.

[16] Furthermore, I agree with the municipality's statement that it will not be in a position to assess whether some records contain the appellant's personal information until the request is processed or the scope of the request is significantly narrowed. However, based on the evidence presented, I am satisfied that most of the records would appear to relate to the appellant in his professional, not personal, capacity. Accordingly, I find that the municipality is entitled to charge a fee to search for responsive records.

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.
[3] See for example orders MO-2188, MO-2189, MO-2204 and PO-2778.

Is the request too broad?

[17] The municipality takes the position that the appellant's request is too broadly worded and states:

> … the scope is very broad requesting documents, both electronic and paper, referencing directly or indirectly the requester for a ten-year period. As the requester is a former employee, his name would be contained on a number of documents including agendas and minutes for meetings which he attended. In addition, the [municipality] has been involved in legal proceedings with the requester. As such the estimate assumes that an employee would have to search 6, 250 paper files (excluding property files) held in the Main Administration Office. In addition, each individual workspace contains files and would need to be searched (58 workspaces).
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> To retrieve electronic records, the fee includes a search of 80 email accounts, and the entire TOMRMS system. The [municipality's] Record Retention By-law and Program are based on the TOMRMS classification system. Records are classified on this basis, but TOMRMS is not a document management system allowing for key-word searches or instant retrieval.

[18] The municipality's interim fee decision advised the appellant that the request was "very broad" and invited him to have further discussions about the scope of the request, which in turn may lower the fee. Based on my review of the file, it does not appear that the appellant worked with the municipality during the request stage to narrow the scope of request. During mediation, the appellant removed from the scope of the request the resumes of six individuals. However, he continued to seek access to "any and all materials, correspondence, emails, minutes of meetings council and staff that directly or indirectly reference" himself.

[19] It was not until the appellant filed his reply representations, that the appellant identified some types of records he is not interested pursuing. In his reply representations, the appellant states:

> …[I am] not looking for information within the period of time that [I] was employed/engaged with the municipality (pre 2007). Regardless if there was information related to [my] professional association with the municipality it too would be accessible under the terms of *MFIPPA*.

[20] Also in his reply representations, the appellant indicates that is not pursuing access to information contained in his personnel files or reports he prepared and submitted during the period of 2005 to 2007.

[21] The appellant also takes the position that "access to files [should be] easy and quick" and provided a copy of an email from a service provider he advises supports his

position. The appellant also states:

> The municipality states it does not have a computer system for its records management system that is known to be false, since all records have been in digital format since 2005. A variety of common search tools can be utilized to access information on all drives in the possession or ownership or control of the municipality.

[22] The municipality does not dispute the appellant's evidence that its records holdings have been converted into digital format since 2005. However, the municipality submits that it does not maintain a searchable database of records and states:

> Records are filed on a dedicated server and classified based on the TOMRMS classification system within Windows Explorer. There is no index of records, nor the ability to search the contents of the record. The only automated search that can be conducted [is] of the file's titles. Such a search reveals only files related to the [appellant's civil claim]. As such, each electronic record would have to be opened and searched to ascertain whether the appellant's name is referenced – 272,000 files at the time of the request, and now 289,000 files.

[23] The municipality also submits that the fee provisions of the *Act* should not be used to allow requesters to conduct a "fishing expedition" and argues that the circumstances in this appeal are similar to those in Order MO-2940.

[24] In Order MO-2940, South Simcoe Police Services Board (the police) received a request under the *Act* from a former employee seeking access to any electronic or hard copy records which mentioned him by name for a seven-year period. Adjudicator Donald Hale found that the portion of the request for hard copy records was too broad and inclusive to enable the police to respond to the request. In that order, Adjudicator Hale states:

> I find that the request is not sufficiently specific to enable the police to conduct searches for responsive records owing to the breadth of the record-holdings they would be required to review. The request as currently framed is overly inclusive and in effect frustrates the right of access under the *Act* by requiring a disproportionate and enormous expenditure of time and effort to locate potentially responsive records. Accordingly, absent any narrowing or focussing on the scope of the request by the appellant with respect to the police officer notebooks or the "internal correspondence", I find that the police are not required to conduct searches of their record-holdings for records responsive to these aspects of the request.
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> I conclude that until such time as the appellant provides more specific information about the nature and extent of the records he is seeking, the police are not required to respond to this aspect of the request, as it is

> currently framed. The supply of more specific information by the appellant will enable the police to more readily locate the information in the notebooks and in any "internal correspondence" that the appellant is seeking, at a greatly reduced fee.

[25] I agree with and adopt the approach in Order MO-2940. In my view, the appellant's request for "any and all materials, correspondence, emails, minutes of meetings council and staff that directly or indirectly reference myself" is too broad to require the municipality to manually search through approximately 10 years of paper and electronic files. In making my decision, I also took into account that the appellant did not make any attempts to limit the number of records which would respond to his request until late in the appeals process. Though the appellant's narrowed request shorten the period of time identified in the request I find that the request remains too broad as it continues to include a great number of records which would relate to him in his professional capacity having regard to the senior nature of his role and responsibilities. In addition, it is not clear to me whether the appellant continues to seek access to records relating to him in a professional capacity given his statement in his reply representations that these types of records are "accessible" under the *Act.*

[26] Even if I accept that the appellant is now not seeking certain records, I find that the revised request frustrates the right of access under the *Act* by requiring the municipality to expend significant time and effort to locate potentially responsive records in its record holdings. In my view, the narrowed request would still capture many records that contain direct or indirect references about the appellant in his professional capacity in reports, council records and other documents given the senior position he held. This would be in addition to any records containing references to the appellant in records created while he was engaged at the municipality which have been referenced or attached to records created after he left.[4]

[27] The *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. For example, section 17(1)(b) requires requesters to provide sufficient detail to enable an experienced employee of the institution, upon reasonable effort to identify the record. In addition, section 36(1)(b) provides that every individual has a right to access their personal information where they are "able to provide sufficiently specific information to render it reasonably retrievable by the institution". Given the appellant's level of responsibility and inside knowledge of the municipality's inner workings, I find that he could have offered a great deal more of assistance to narrow the number of documents which may respond to his request. For example, the appellant could have identified the specific types of records he seeks in addition to where and who he believes would have such records. Alternatively, the appellant could have filed a request for "any and all records" relating to identified subject-matters, such as his law suit or communications between specific individuals during a defined period of time.

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[4] Because of my finding, it is not necessary for me to address the issue of the timing of the appellant's "narrowing" of his request in his reply representations.

[28] Having regard to the above and the approach taken in Order MO-2940, I find that the municipality is not required to respond to the portion of the appellant's request for records which require it to manually search effectively all of its record holdings, including its electronic management system (TOMRMS).

[29] Though the appellant insists that the municipality has the ability to perform key word searches to locate electronic records which reference the appellant, I have not been presented with sufficient evidence demonstrating that the municipality's present electronic management system has this capability.[5]

[30] I accept the municipality's evidence that its electronic management system does not have the capability to conduct a key-word search to review the text of hundreds of thousand files to quickly locate responsive records. Accordingly, the appellant's request would require a manual search of the titles of the digital files stored in the electronic management system. In addition, a search for responsive records would also require the municipality to search its paper records holdings, including those stored at different locations and staff workspaces. Finally, the municipality's search would require a search of each account in its email server.

[31] Having regard to the above, I find the appellant's request is too broad to enable the municipality to conduct searches for responsive records that can not be retrieved from its email servers, taking into consideration the volume of records which would have to be reviewed.

[32] I find that until the appellant narrows the scope of request or identifies with more specificity the type of records he is seeking, the municipality is not required to respond to the request, but for the portion of the request for email records.

DISCUSSION:

[33] As I have found that the municipality is not required to search its paper files and electronic management system digitizing its paper files, the remaining issue in this appeal is whether the municipality's fee estimate for the requested email records should be upheld.

[34] Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[6] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or

[5] The appellant provided a copy of an email exchange he had with the service provider in support of his position that the estimated search time calculated by the municipality is exaggerated. I have reviewed this email and it does not speak to the issue of whether or not key word searches in the municipality's electronic management system would extract responsive records.
[6] Section 45(3).

- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[7]

[35] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[8] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[9]

[36] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[10] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

[37] The municipality provided the following breakdown representing its search of approximately 80 email accounts including the accounts of councillors and former staff:

> 80 accounts x 10 minutes per account = 800 minutes = 13.33 hours
>
> 13.33 hours 2 $7.50 per 15 minutes = $400.00

[38] Section 45(1) requires an institution to charge fees for requests under the *Act*. Section 45(1) provides that requesters are expected to pay fees in the amount prescribed by the regulations for search and preparation time for records that do not contain their personal information.

[39] Based on the information provided to me, I found that most of the responsive records located as a result of the municipality's search of the identified 80 email accounts would refer to the appellant in his professional capacity. However, should the municipality determine in its final fee and access decision that some of the records contain the appellant's personal information, it cannot charge the appellant for searching or preparing a record which contains his personal information and will have to adjust its fee.

[40] The municipality estimates it will take 10 minutes for an experienced staff member to search each of the 80 email accounts for a total of 800 minutes. The appellant made two arguments in support of his position that the municipality's search time is exaggerated:

- The appellant argues that it should take no more than 1.3 minutes to conduct a key word search for responsive records. The appellant advises that it would take no more than 5 minutes for the municipality to conduct a search of its electronic records of its 61 employees and councillor members, including their email

[7] Order MO-1699.
[8] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[9] Order MO-1520-I.
[10] Orders P-81 and MO-1614.

records.[11] Further, the actual search time would be reduced to 1.3 minutes as the appellant anticipates only 3 individuals, representing 5% of the 61 individuals, would have responsive records (61 individuals x 5% = 3 people x 26 seconds = 1.3 minutes); and

- The appellant also submits that he obtained information from a service provider who advised him that it could extract the necessary information to identify responsive email records in "approximately 2 hours" if a simple back-up could be executed. Otherwise, it "might be ½ hour per user account" if the individual account files had to be exported and converted into another file format.[12]

[41] I have reviewed the submissions of the parties and find that the amount of time the municipality has estimated it will take to review each email account is reasonable. I also find that the municipality calculated its $400.00 fee in accordance with section 45(1)(a) and *Regulation 823, section 6.3*. In my view, the appellant's calculations are based on conjecture and incomplete information.

[42] Having regard to the above, I will allow the municipality's estimated fee of $400.00 to process the portion of the appellant's request for email records referring to him.

ORDER:

1. I uphold the municipality's fee estimate of $400.00 for search time required to located the requested email records.

2. The municipality is not required to perform any further searches for responsive records that may be located in its paper record holdings, electronic record management system or staff workspaces until such time as the appellant provides additional information to facilitate a narrowed search.

Original Signed by: October 31, 2017

Jennifer James
Adjudicator

[11] The appellant advised that the municipality's financial records report that it has 61 individuals on its payroll.

[12] The appellant provided a copy of an email exchange he had with the service provider. In the email, the service provider refers to the use of a back-up program to clone and image records contained on an "individual computer". With respect to email records, the service provider advises that backing up the system may only take 2 hours however "extensive configuration" of the new host machine would be required make the "database useable".